No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY, ET AL., PETITIONERS

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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31 pp

QUESTION PRESENTED

Whether federal law permits national banks, wherever located, to act as agents in the sale of annuities.

PARTIES TO THE PROCEEDING

The petitioners are Comptroller of the Currency Eugene Ludwig (substituted as a party pursuant to Rule 35.3), the Office of the Comptroller of the Currency, and the United States. The respondents are the Variable Annuity Life Insurance Company and, under Rule 12.4, NationsBank of North Carolina, N.A., and NationsBanc Securities, Inc., intervenor-defendants below. We are advised that the respondents who were intervenor-defendants below also intend to seek review of the judgment in this case.

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The Solicitor General, on behalf of the United States, the Comptroller of the Currency, and the Office of the Comptroller of the Currency, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (NBNC Pet. App. 1a-17a)[1] is reported at 998 F.2d 1295. That court's order denying rehearing and rehearing en banc, and the opinion dissenting therefrom (NBNC Pet. App. 18a-28a), are reported at 13 F.3d 833. The

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[1] "NBNC Pet. App." refers to the appendix to the petition for a writ of certiorari in *NationsBank of North Carolina, N.A., et al.* v. *Variable Annuity Life Insurance Co.* (filed April 13, 1994), which seeks review of the same decision of the court of appeals.

opinion of the district court (NBNC Pet. App. 29a-34a) is reported at 786 F. Supp. 639. The approval letter of the Office of the Comptroller of the Currency (NBNC Pet. App. 35a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1993. A petition for rehearing was denied on January 13, 1994. NBNC Pet. App. 18a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Section 5136 of the Revised Statutes of 1878, 12 U.S.C. 24, provides in pertinent part as follows:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> * * * * *
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of

title 62 of the Revised Statutes. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock[.]

2. Section 13, par. 9, of the Federal Reserve Act, Act of Dec. 23, 1913, ch. 6, 28 Stat. 263 (as added by Act of Sept. 7, 1916, ch. 461, 39 Stat. 753), as amended by Act of Oct. 15, 1982, Oct. 15, 1982, Pub. L. No. 97-320, Tit. IV, § 403(b), 96 Stat. 1511, to be codified at 12 U.S.C. 92, provides as follows:

In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided, however*, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies

issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

STATEMENT

1. This litigation involves a challenge to the Comptroller of the Currency's approval of an application by the corporate predecessors of respondents NationsBank of North Carolina, N.A., and its brokerage subsidiary, NationsBanc Securities, Inc. (collectively, NationsBank), for permission for the subsidiary to act as an agent for customers in the purchase of various types of fixed and variable annuities.

Annuities are contracts under which a purchaser makes one or more premium payments to the issuer, in return for which the issuer promises to make one or more payments back to the purchaser when the contract matures. In a classic "fixed" annuity, the issuer promises to make equal payments of a predetermined amount at regular intervals, commencing at maturity of the contract and continuing until the death of the purchaser or some designated beneficiary. The amount of the payments under such a contract is generally calculated so that a purchaser or beneficiary dying at the actuarially predicted time will receive back, over his life, an amount equal to the total premium paid, less applicable expenses and fees, plus interest at a predetermined rate.[2] The pur-

[2] Modern "fixed" annuity contracts, including all those at issue in this case, often provide both for a low guaranteed minimum interest rate and for "excess" interest, payable at the issuer's discretion at whatever rate it may set from time to time. See NBNC Pet. App. 36a-37a & n.1.

chaser of such a contract thus relinquishes control over the invested premium and bears the risk that he or the beneficiary will die before recovering the entire investment, in exchange for the issuer's guaranty of specified payments to the date of death, and its assumption of the risk that the purchaser or beneficiary will live longer than predicted and thus increase the return on the purchaser's investment.

There are many forms of "variable" annuity. In a typical case the issuer promises to segregate premiums received from the purchaser and invest them, over the life of the contract, as directed by the purchaser—for example, in one or more of several mutual funds. The value of the purchaser's annuity at maturity is determined by the performance of those investments; thus, the purchaser retains both investment control and the associated risk of gain or loss. At maturity, the purchaser usually has several options for recovering the accumulated (or remaining) value of the account, including receiving it as a lump sum, in level periodic payments calculated in the same manner as for a fixed annuity, or in variable payments continuing for the life of the purchaser or a designated beneficiary. See generally NBNC Pet. App. 35a-36a; Office of the Comptroller of the Currency (OCC), Interpretive Letter No. 499, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 at 71,211 (1990) (OCC Letter 499) (describing annuities involved in this case); *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65, 69-72 & n.13 (1959).

Both fixed and variable annuities are covered by an unique and complex set of federal income tax rules that generally allow for deferral of tax on the investment returns allocable to a purchaser's annuity

premiums until those returns are withdrawn during the payout phase of the contract. See 26 U.S.C. 72. Because the tax rules also generally provide for penalties if an annuity investment is withdrawn before the purchaser is 59 1/2 years old, and for unfavorable tax treatment of amounts withdrawn before the maturity of the contract, see 26 U.S.C. 72(e) and (q), annuities are frequently marketed as tax-sheltered means of saving for retirement. See NBNC Pet. App. 38a.

2. NationsBank proposed to act as a sales agent for (not as issuer of) a variety of annuity contracts that would allow purchasers to design "a flexible, multi-faceted investment package comprised of variable and fixed annuity options." NBNC Pet. App. 37a. The OCC Chief Counsel's interpretive letter underlying the approval of NationsBank's application (see *id.* at 35a) noted that the Comptroller had previously approved the sale of variable annuities by national banks, on the ground that "variable annuity contracts are securities, functionally resembling shares in a mutual fund, and * * * banks are authorized, pursuant to 12 U.S.C. 24(7) to buy and sell securities for the account of customers." OCC Letter 499, at 71,211, citing OCC, Interpretive Letter No. 331, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (1985) (OCC Letter 331). The additional analysis provided by the Chief Counsel's letter and the Comptroller's approval in this case therefore focused on NationsBank's proposal to market fixed annuities.[3]

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[3] The Comptroller determined that sales of fixed annuities were permissible whether or not such annuities were also "securities" for purposes of 12 U.S.C. 24 Seventh as amended

In evaluating NationsBank's application, the Comptroller explained that "[a]s part of their traditional role as financial intermediaries, banks have broad powers to buy and sell financial investment instruments as agent for customers." NBNC Pet. App. 38a. He noted that "[a]lthough annuities have historically been a product of insurance companies, they are primarily financial investments," because fixed annuity investors "are not seeking to pool a catastrophic risk such as death, injury, or property damage, but are instead seeking a guaranteed, long-term return on their assets." *Ibid.* The opinion acknowledged the element of "mortality risk" present in some annuities, but concluded (in accordance with a number of authorities) that it "is essentially an investment risk, not an insurance risk," and that "although annuities often share with insurance the need for actuarial calculations, they are primarily a vehicle for investment." *Id.* at 38a-39a. Finally, the Comptroller found a "close functional resemblance between fixed annuity contracts and other financial investment instruments that banks may sell as agent" (*id.* at 39a), including variable annuities, conventional debt instruments and certificates of deposit. *Id.* at 39a-41a. He therefore concluded that "fixed annuity contracts are financial investment instru-

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by Section 16 of the Banking Act of 1933 (Glass-Steagall Act), ch. 89, 48 Stat. 184-185 ("The business of dealing in securities and stock by [a bank] shall be limited to purchasing and selling * * * without recourse, solely upon the order, and for the account of, customers[.]"). He therefore had no occasion to consider whether fixed annuities are "securities" for purposes of Section 24 Seventh, and this case does not present that issue. NBNC Pet. App. 37a-38a.

ments that national banks have authority to sell as agent." *Id.* at 41a.

The Comptroller also considered (NBNC Pet. App. 41a-47a) whether 12 U.S.C. 92, which permits national banks in towns of 5,000 or fewer inhabitants to "act as the agent for any fire, life or other insurance company * * * by soliciting and selling insurance and collecting premiums," by implication prohibits banks in other places from acting as a sales agent for annuities. He first noted OCC's general position that Section 92 was intended only to provide an additional source of revenue to national banks operating in small towns, and has no independent effect on the powers of banks operating elsewhere. NBNC Pet. App. 42a. After canvassing the available authorities (*id.* at 43a-47a), the Comptroller then concluded that, just as annuities are best characterized as investment products for purposes of Section 24 Seventh, so too they "lack the basic insurance characteristic of indemnification against risk of loss," and thus should not be considered "insurance" for purposes of Section 92. NBNC Pet. App. 47a.

Finally, the Comptroller pointed out (NBNC Pet. App. 42a-43a) that Section 92 speaks only of a bank's power to act as an agent for any "fire, life, or other general insurance company." Applying the principle of "ejusdem generis," he concluded that the statute should in all events be read to apply only to "types of insurance that are similar to fire and life insurance, such as other general casualty insurance policies." NBNC Pet. App. 43a. The Comptroller distinguished on that basis the Fifth Circuit's previous decision in *Saxon* v. *Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010 (1968), which held that Section 92 prevented the Comptroller from allowing a bank not

located in a small town to sell borrowers "broad forms of automobile, home, casualty and liability insurance." 399 F.2d at 1012. The Comptroller determined that, even if annuities were to be considered "insurance" for purposes of Section 92, they would remain "a specialized product, unrelated to the general life and casualty policies that section 92 concerns." NBNC Pet. App. 43a. That Section would therefore have no application to annuities, which should be analyzed only to determine whether their sale was "incidental" to "the business of banking" under Section 24 Seventh. NBNC Pet. App. 43a.

3. Variable Annuity Life Insurance Co. (VALIC), an issuer of annuities, filed suit in federal district court to overturn the Comptroller's approval. After ruling (in an unreported order) that VALIC could properly bring suit in the Southern District of Texas to challenge the Comptroller's approval of annuity sales by a bank located in North Carolina, the district court granted summary judgment for the Comptroller. NBNC Pet. App. 29a-34a. Addressing primarily VALIC's argument under 12 U.S.C. 92, the court found it "neither arbitrary nor capricious" to view that Section "as a supplemental powers provision and not a limitation on national banks['] incidental powers under § 24(7)." NBNC Pet. App. 33a-34a. Moreover, applying the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court deferred to the Comptroller's "reasonable interpretation" that "annuities are primarily financial investment instruments, not insurance" for purposes of the relevant banking laws. NBNC Pet. App. 33a. Finally, the court upheld as reasonable the Comptroller's determination that "annuities are a specialized prod-

uct and not a 'broad form' of insurance" covered by Section 92 and the decision in *Saxon*. NBNC Pet. App. 34a.

4. The court of appeals reversed. NBNC Pet. App. 1a-17a. Relying in substantial part on its decision in *Saxon*, the court determined that 12 U.S.C. 92 imposes an affirmative limitation on the power of national banks not located in small towns to sell any form of "insurance." NBNC Pet. App. 6a-10a, 15a-17a. The court then rejected the Comptroller's conclusions that annuities are not "insurance" for purposes of Section 92 (NBNC Pet. App. 10a-13a) and that, in any event, the statute applies only to "broad" types of insurance akin to fire and life insurance (*id.* at 13a-14a).

The full court of appeals denied the Comptroller's and NationsBank's suggestions for rehearing en banc. NBNC Pet. App. 18a-19a. Of the thirteen active judges on the court, six recused themselves. *Id.* at 19a n.*, 20a. Because the Fifth Circuit counts disqualified judges in determining whether a majority of the court wishes to review a case en banc (see *id.* at 20a n.1), an order granting the suggestions would have required an unanimous vote of the remaining seven judges—including the two who sat on the panel that decided the case. Thus, although four judges—a majority of those not recused—voted to hear the case, the suggestions were denied. The four dissenters emphasized the importance of the case "to the banking industry and to commerce and competition in general." *Id.* at 21a. Leaving aside the issue of overruling *Saxon*, the dissenters concluded that, on the remaining question whether all annuities are forms of "insurance" for purposes of Section 92, "[t]he better view—and certainly a reasonable one that is

entitled to deference under *Chevron*—is that of the Comptroller." NBNC Pet. App. 23a-24a.

REASONS FOR GRANTING THE PETITION

1. The decision below rests on two conclusions: that fixed and variable annuities are forms of "insurance" for purposes of 12 U.S.C. 92, and that Section 92 prohibits banks located outside small towns from acting as sales agents for any "insurance" product, even if the Comptroller has determined that such sales are incidental to the business of banking within the meaning of 12 U.S.C. 24 Seventh. Both conclusions are erroneous. More important, in reaching neither did the court of appeals adequately justify its rejection of the Comptroller's contrary interpretations of the banking statutes that Congress has entrusted him to administer. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

a. The Comptroller's decision in this case determined (NBNC Pet. App. 43a-47a) that annuities are not "insurance" within the meaning of 12 U.S.C. 92, which provides that national banks doing business in small towns "may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company * * * by soliciting and selling insurance and collecting premiums on policies issued [.]" The statute itself neither defines the term "insurance" nor addresses the issue of annuities. As the district court recognized (NBNC Pet. App. 33a), under *Chevron* that interpretive gap in the banking laws is one for the Comptroller to fill, provided his interpretation is reasonable. 467 U.S. at 843; see also *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388,

403-404 (1987). The interpretation adopted by the Comp-troller in this case is reasonable, and it is entitled to deference.

First, as the Comptroller explained, "[d]ictionary definitions of 'insurance' invariably describe it as a contract for indemnification against risk of loss." NBNC Pet. App. 43a-44a (citing examples). Annuities, on the other hand, to a large extent "lack the basic insurance characteristic of indemnification against risk." *Id.* at 47a. Indeed, as the Comptroller observed, annuity purchasers generally "are not seeking to pool a catastrophic risk such as death, injury, or property damage, but are instead seeking a * * * long-term return on their assets."[4] *Id.* at 38a.

Second, the Comptroller marshalled considerable authority for the proposition that annuities are not treated as "insurance" in other contexts, including tax, bankruptcy, and insurance law.[5] NBNC Pet.

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[4] In this respect annuities bear some resemblance to "whole" (as opposed to term) life insurance, which also builds cash value over time. A whole life policy, however, in effect combines term life insurance and investment components. An annuity resembles only the investment component—a point consistent with the Comptroller's conclusion (NBNC Pet. App. 45a) that annuities are "primarily a vehicle for investment, not indemnification." Whole life insurance and annuities also both allow invested funds to compound on a federal income tax-deferred basis. The tax benefits accorded annuities do not, however, depend on assimilating them to insurance; annuities are treated as *sui generis* for federal tax purposes. See 26 U.S.C. 72.

[5] The Comptroller acknowledged (NBNC Pet. App. 46a) that cases construing the exemption for "[a]ny insurance or endowment policy or annuity contract or optional annuity contract" under Section 3(a)(8) of the Securities Act of 1933, 15 U.S.C. 77c(a)(8), "occasionally speak of fixed annuities as being

App. 44a-45a & nn.14-18. Indeed, as the New York Court of Appeals recently concluded in deferring to a state banking law interpretation based on the Comptroller's determination at issue in this case, "the great weight of authority supports the position that annuities are not insurance." *New York State Ass'n of Life Underwriters Inc.* v. *New York State Banking Dep't*, No. 38 (Mar. 30, 1994), slip op. 11. Accord, *e.g.*, 1 J. Appleman, *Insurance Law and Practice* § 84, at 295 (1981) ("Annuity contracts must * * * be recognized as investments rather than as insurance."). This Court itself has recognized that in terms of their risks and benefits, "annuity and insurance are opposites." *Helvering* v. *Le Gierse*, 312 U.S. 531, 541 (1941). Or, as one court aptly put it, "annuities are not indemnities for death but are investments for life." *Corporation Comm'n* v. *Equitable Life Assur. Soc'y.*, 239 P.2d 360, 362 (Ariz. 1951).

The court of appeals did not evaluate the reasonableness of the Comptroller's interpretation of the term "insurance" as used in Section 92, but rather approached the question de novo. Whether or not the court's conclusions could be viewed as reasonable, standing on their own, that approach to review of the Comptroller's decision was clearly erroneous. See, *e.g.*, *Chevron*, 467 U.S. at 843-845; *Clarke* v. *Securities Industry Ass'n*, 479 U.S. at 403-404. The court never addressed the Comptroller's fundamental point that annuities are primarily investment vehicles, not contracts of indemnification. Having failed to

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'insurance' rather than 'securities.'" As the Comptroller pointed out, however, those cases interpret a different statute with different purposes, and do not control the analysis in the context of the banking statutes.

impeach the reasonableness of the Comptroller's construction in light of the language and purposes of Section 92 and the remainder of the banking laws, the court erred in substituting its judgment for his on matters within the Comptroller's special expertise and regulatory competence.

b. The court of appeals also erred in refusing to defer to the Comptroller's conclusion that even if annuities were considered "insurance" for purposes of 12 U.S.C. 92, the statute should not be construed to prohibit banks outside small towns from selling them (as agents) once the Comptroller has concluded that such sales are incidental to the business of banking.

Section 92 provides that "*[i]n addition to* the powers now vested by law in national banking associations," national banks in small towns may "act as the agent for any fire, life or other insurance company" in selling insurance policies. (Emphasis added.) The introductory phrase "in addition to" shows that Section 92 is a grant of additional powers for a special situation.[6] It does not purport to define the scope of

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[6] The statute's legislative history also indicates that Congress thought of Section 92 as a grant of additional powers, not a limitation on otherwise authorized activities. Senator Owen, Section 92's sponsor, described the provision as "giving some additional powers to the small banks to act as agents in insurance matters." 53 Cong. Rec. 11,002 (1916); see also *id.* at 11,001 (Comptroller's letter explaining that proposal reflected consideration of "how the powers of these small national banks might be enlarged"). See also *Independent Ins. Agents of Am., Inc.* v. *Board of Governors*, 736 F.2d 468, 477 n.6 (8th Cir. 1984) ("Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance."). The court of appeals also cited (NBNC Pet. App. 16a) documents written by the Comptroller and counsel to the Federal Reserve, prior to Sec-

the other lawful "powers" whose existence it assumes and supplements. Those powers, which pre-date and survive Section 92, include the general authority under Section 24 Seventh to "exercise * * * all such incidental powers as shall be necessary to carry on the business of banking." Even if annuities are "insurance," there is no reason why the Comptroller may not conclude that those incidental powers extend to acting as a sales agent for limited classes of such "insurance" products, whose essential investment character brings them within the ambit of banks' traditional investment agency activities on behalf of their customers.[7]

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tion 92's passage, to show that Congress believed national banks had no authority to act as insurance agents before Section 92 was enacted. See 53 Cong. Rec. 11,001 (1916) (letter from Comptroller Williams to Senator Owen); *Right of a National Bank To Write Insurance Through Its Officers*, 2 Fed. Res. Bull. 73, 74 (1916) (letter from Board Counsel Elliot to Board Governor Hamlin). Both documents refer to insurance in general terms. See 53 Cong. Rec. 11,001 (1916) (referring to "fire, life, etc." insurance); 2 Fed. Res. Bull. at 73 (analyzing the power of national banks to write "fire, cyclone, liability and other kinds of insurance"). Neither suggests that specific kinds of insurance agency activity that are closely connected to banking would not fall within the incidental powers of national banks.

[7] The court of appeals stated in passing (NBNC Pet. App. 14a-15a) that even if the sale of annuities were "incidental" to the "business of banking," it could not be authorized under 12 U.S.C. 24 Seventh because it is not "necessary to carry on" a banking business. Assuming that the court's observation should be viewed as an independent holding, it clearly embodies an unduly crabbed notion of the statutory term "necessary." See, *e.g.*, *M & M Leasing Corp.* v. *Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), cert. denied, 436 U.S. 956 (1978); *New York Ass'n of Life Underwriters*, slip op. 7-10

To be sure, Section 92 carries some negative implication; there would be little point in granting small-town banks the power to act as insurance agents if any bank could already do so under Section 24 Seventh. But the court of appeals swept too broadly in concluding that Section 92's reference to *some* forms of "insurance" necessarily implied that banks could have no power, independent of Section 92, to sell *any* kind of "insurance." Section 92 applies only to the activities of national banks acting as agents for any "fire, life or other insurance company." Under the interpretational principle of *ejusdem generis*, a general term in a statutory list should be understood in light of the specific terms that surround it. *E.g.*, *Hughey* v. *United States*, 495 U.S. 411, 419 (1990). Applying that principle, the Comptroller permissibly concluded that Section 92's grant of authority—and its concomitant implication that authority was otherwise lacking—should be construed to refer only to the unrestricted sale of fire, life, and other similar insurance, and not to the sale of investment-type "insurance" products the sale of which falls within the business of banking or is incidental thereto.[8]

(rejecting same argument under New York law on which federal law was modeled); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413-415 (1819); cf. *National R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 112 S. Ct. 1394, 1402 (1992).

[8] Indeed, application of *ejusdem generis* is necessary to give meaning to Congress's specification of "fire" and "life" insurance in Section 92. Under the court of appeals' reading of the statute, those terms are entirely unnecessary, since all types of insurance, including fire and life insurance, are encompassed in the phrase "any * * * insurance company."

The Comptroller's construction maintains an appropriate balance between Sections 24 Seventh and 92. The general grant of powers in Section 24 Seventh permits banks to engage only in activities (including insurance agency activities) that are "incidental" to the "business of banking." Section 92, by contrast, permits banks located in small towns to act as agents for the sale of the full range of insurance products, including those sold by "any fire, life or other insurance company," whether or not such sales are incidental to the business of banking. It is this additional authority—to engage in the sale of forms of insurance not otherwise within the business of banking or incidental thereto—that Section 92 gives to national banks in small towns. That grant does not negate the possibility that the sale of annuities, even if properly denominated as "insurance," might be sufficiently related to the business of banking to come within the existing incidental powers of national banks. And the question whether such products, or any others, *are* so related is one uniquely within the expertise and competence of the Comptroller, not the courts.[9]

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[9] As explained above (see pages 5-6 & n.3, *supra*), the Comptroller's decision in this case focuses on fixed annuities, the sale of variable annuities having been approved some years before. The judicial opinions below in this case make no distinction between fixed and variable products in their analysis. In our view, the Comptroller's rationale for approving the sale of fixed annuities—that they are "financial investment interests" that banks may buy and sell on behalf of customers as part of their "traditional role as financial intermediaries" (NBNC Pet. App. 38a)—applies *a fortiori* to sales of variable annuities, which are even more clearly investment-oriented products. Alternatively, the Comptroller's prior decision in OCC Letter 331, which held that sales of variable annuities are

The question whether Section 92 prohibits national banks in large towns from acting as agents for any sort of "insurance" product has divided the courts of appeals. The court below in this case and the Second Circuit in *American Land Title Ass'n* v. *Clarke*, 968 F.2d 150 (1992), cert. denied *sub nom. Ludwig* v. *American Land Title Ass'n*, 113 S. Ct. 2959 (1993), have held that Section 92 prohibits the sale of annuities and title insurance, respectively, despite explicit determinations by the Comptroller that agency sales of those products are incidental to the business of banking. By contrast, the D.C. Circuit in *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164, 1169-1170 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980), rejected just such a reading of Section 92 and upheld the Comptroller's regulatory authority to permit the agency sale of so-called "credit life insurance" as incidental to the banking business.[10]

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permissible because such annuities are "securities" for purposes of 12 U.S.C. 24 Seventh's explicit provision addressing the permissible scope of banks' "business of dealing in securities," is incorporated by reference in the Comptroller's decision in this case. NBNC Pet. App. 35a, 37a-38a; OCC Letter 499. Cf. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943) (agency decision may be upheld only on grounds relied upon by agency). That prior decision is as reasonable and entitled to deference as the Comptroller's decision with respect to fixed annuities. Indeed, because a primary rationale for the prior decision was that variable annuities are primarily investment contracts (see OCC Letter 331, at 77,774, 77,776), there is little functional difference in the analysis for purposes of this case.

[10] The court below purported to distinguish *Heimann* by noting that credit life insurance "secures the repayment of the borrower's indebtedness, and thus is intimately related to the bank's primary business of lending." NBNC Pet. App. 14a. While certainly true, that statement is unfortunately irrelevant

See also *American Ins. Ass'n* v. *Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (national bank subsidiary permitted to sell municipal bond "insurance" by analogy to established power to provide standby letters of credit); *Independent Ins. Agents of Am., Inc.* v. *Board of Governors*, 736 F.2d 468, 477 n.6 (8th Cir. 1984) (permitting agency sales of insurance related to protecting security interest in financed property, and noting in dictum a "strong argument" that the Fifth Circuit's prior *Saxon* decision was "wrongly decided"); *New York State Ass'n of Life Underwriters Inc.* v. *New York State Banking Dep't*, *supra* (deferring to state regulator's decision permitting New York banks to act as agents for sales of annuities).

2. Although the issue of whether and to what extent Section 92 limits banks' ability to make agency sales that the Comptroller has otherwise determined to be incidental to their banking business under 12 U.S.C. 24 Seventh has produced conflict among the circuits, the Court denied our request to resolve that conflict last Term. *Ludwig* v. *American Land Title Ass'n*, 113 S. Ct. 2959 (1993). This case involves the additional issue whether annuities are "insurance" for purposes of Section 92. Nonetheless, we would not

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under the court's own holding. The court's conclusion that Section 92 bars banks from selling annuities rested not on a judgment that annuities are insufficiently related to the business of lending to come within a bank's incidental powers, but rather on a determination that they are contracts of "insurance," and *ipso facto* prohibited under Section 92 and impermissible under Section 24 Seventh. NBNC Pet. App. 13a-17a. While the characterization of annuities may be debatable, that of credit life insurance is not—it is indisputably "insurance." The court's observation therefore does nothing to lessen the conflict between its logic and the result in *Heimann*.

normally seek further review under these circumstances, even though we think the issues involved are of substantial legal and practical importance. Additional considerations peculiar to this case, however, persuade us that review is warranted here.

a. The decision below involves a particularly flagrant failure by the court of appeals to apply the well-settled principles of deference articulated by this Court in *Chevron* and applied specifically to the Comptroller in *Clarke* v. *Securities Industry Ass'n.* The district court properly applied those principles in evaluating the Comptroller's decision in this case. The court of appeals, by contrast, dismissed *Chevron* on the ground that the text and intent of 12 U.S.C. 92 were so clear as to preclude interpretation. NBNC Pet. App. 9a. The implausibility of that contention is apparent from the differing arguments mustered by the Comptroller's decision on the one hand and by the court's own opinion on the other. It is underscored by the dissent of four judges from the denial of rehearing en banc, on the explicit ground that the Comptroller's position on the meaning of "insurance" for purposes of Section 92 represents "[t]he better view—and certainly a reasonable one that is entitled to deference under *Chevron*" (NBNC Pet. App. 24a), and by the conflict among the courts of appeals on the larger issue of Section 92's function and its relationship to Section 24 Seventh.

The regulation of banking is an area of great importance, requiring a combination of special functional expertise and informed choices among sometimes conflicting goals. Those goals include both the maintenance of a strong banking industry in light of modern developments in investment and finance and the protection of banks and bank customers from the

expansion of bank activities into inappropriate areas. It would be difficult to identify a regulatory context in which it is clearer that courts should defer, in matters of statutory interpretation, to "reasonable accommodation[s] of conflicting policies that were committed to the agency's care by the statute." *Chevron*, 467 U.S. at 845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)). In this case the interpretations adopted by the Comptroller were thoroughly discussed and well supported in his decision. The court of appeals' failure to defer to those interpretations represents a clear and important error.

b. The opportunity for rehearing and correction by the full court often suffices to protect against a panel's failure to apply well-settled principles correctly in the context of a particular case. In this case a majority of the active judges voting on the issue—including four of the five who did not serve on the original panel[11]—favored granting rehearing en banc. NBNC Pet. App. 20a. Because six active judges recused themselves, however, the grant of rehearing would have required the concurrence of *all* non-recused active judges, including the original panel members. As the dissenters from the denial of rehearing en banc pointed out, the Comptroller was therefore precluded from "discern[ing] the views of a substantial majority of the active judges" on the court of appeals. *Ibid.* Moreover, as the dissenters pointed out, "[r]ecusal seems to be a particular problem in cases involving large banks and their

[11] The original panel included judges Jolly and Wiener and Senior Judge Goldberg, who was not entitled to vote on the suggestion for rehearing en banc. See Fed. R. App. P. 35(a).

regulatory agencies (and the attorneys of both) with whom several active judges are likely to have relationships that require them to recuse." *Id.* at 21a. For that reason (and because it is impossible to determine why particular judges recused themselves in this case), it is possible that the same problem would recur were further cases raising the same issues brought before the Fifth Circuit.

c. Moreover, it is possible that neither the government nor affected banks will have the opportunity to litigate the issues involved in this case further in other circuits. Respondent VALIC, which is headquartered in Houston, underwrites and sells fixed and variable annuities in all 50 States. NBNC Pet. App. 4a. Assuming that venue was proper in this case (where the bank involved is not located in the Fifth Circuit and sold no annuities there), VALIC is therefore in a position to challenge in the courts of the Fifth Circuit any future decision by the Comptroller to approve a bank's application to sell annuities.[12] Thus, it is possible that the decision

[12] A national bank might choose to proceed with sales that it believed to be within its authority, without seeking explicit approval from the Comptroller. We are informed, however, that for a variety of legal and business reasons, agency sales of annuities are almost invariably conducted through brokerage subsidiaries, rather than directly by the parent banks. Sales by such subsidiaries are subject to mandatory prior legal and policy review by the Comptroller. 12 C.F.R. 5.34. We are also informed that national banks of significant size would typically have sufficient business contacts with one or more States in the Fifth Circuit to render them amenable to suit there. It thus appears likely that any suit VALIC might be able to bring directly against such a bank, to challenge its sales of annuities in alleged violation of federal law, could also be brought in the Fifth Circuit.

below will effectively preclude national banks from selling annuities of any type—and perhaps a wide variety of other products that are or may be thought of as "insurance"—anywhere in the country (other, presumably, than in small towns covered by Section 92), despite the Comptroller's conclusion that they have the power to do so. The Second Circuit's decision in *American Land Title* presented no similar risk that it would preclude further litigation in other circuits.

d. The issue of Section 92's scope and effect is inextricably intertwined with the additional issue present in this case: whether the annuities at issue here constitute "insurance" for purposes of that Section. In addition, the ability to sell annuities is of far greater importance to national banks—and therefore to their federal regulators—than the ability to sell title insurance of the sort involved in *American Land Title*. The dissent from denial of rehearing en banc in this case notes (NBNC Pet. App. 21a-22a) that in 1992 banks sold some $12.2 billion of fixed and variable annuities, representing approximately 17% of all individual annuities and 21.9% of fixed annuities sold nationwide, and accounting for some 7% of all bank brokerage sales.[13] We are informed that the volume of bank annuity business increased substantially in 1993.[14]

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[13] We are advised that annuities are valued for these purposes on the basis of the gross premium required to be paid by the purchaser over the life of the contract.

[14] In light of the substantial growth in annuity sales through banks, the federal bank regulatory agencies (including OCC) recently proposed to require all banks under their jurisdiction to report such sales (together with sales of mutual fund shares)

e. Finally, the conflict described in the *American Land Title* petition has now deepened. The court of appeals in this case cited and relied on *American Land Title* and rejected (while purporting to distinguish) the D.C. Circuit's contrary decision in *Heimann*. NBNC Pet. App. 6a-7a, 13a-14a, 16a. Furthermore, as discussed above, the New York Court of Appeals has recently upheld a state regulatory decision—prompted by and premised in large part on the Comptroller's decision in this case—that New York banks should be permitted to make agency sales of annuity products. *New York State Ass'n of Life Underwriters*, slip op. 2-3, 11-14. While the New York court's decision is based on state law and thus presents no direct legal conflict with the decision below (see *id.* at 13), it is nonetheless relevant in two respects. First, the court's appropriate deference under state law principles to a determination by state banking regulators that was explicitly based on "reasons similar to those stated in OCC Letter 499" (*ibid.*) provides a sharp contrast to the court of appeals' refusal in this case to defer, under *Chevron*, to the Comptroller's decision contained in that letter itself.[15] Second, the existence of approval for sales of annuities by New York banks

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in their quarterly Reports of Condition and Income. See 59 Fed. Reg. 2603-2604 (1994).

[15] The similarity of the issues before the New York court and the issues in this case is further emphasized by the fact that 12 U.S.C. 24 Seventh, the basic federal bank powers statute at issue here, was originally modeled on the parallel provision of New York law at issue in *New York State Ass'n of Life Underwriters*. See, *e.g.*, Trimble, *The Implied Power of National Banks To Issue Letters of Credit and Accept Bills*, 58 Yale L.J. 713, 719 (1949).

raises the undesirable prospect of important differences in bank powers that arise from the difference between state and federal regulation, and yet have been judicially placed beyond the power of federal regulators to correct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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